

**Summary Minutes  
City of Sedona  
Board of Adjustment Meeting  
Vultee Conference Room, Sedona City Hall, Sedona, AZ  
Wednesday, September 21, 2011 – 2:00 p.m.**

**1. Verification of Notice, Call to Order, Pledge of Allegiance and Roll Call.**

Chairman Gilgoff called the meeting to order at 2:00 p.m.

**Roll Call:**

**Board Members:** Chairman Joel Gilgoff, Vice Chairman Gary Rich and Board Members Larry Beddome - arrived at 2:07 p.m., Alex Gillon and Robert Gordon

**Staff:** Nick Gioello, John O'Brien and Donna Puckett

**Council Liaison:** Dan McIlroy

*Note: The Chairman proceeded to agenda item 3.*

**3. CONSIDERATION OF THE FOLLOWING REQUEST(S) THROUGH PUBLIC HEARING PROCEDURES:**

Chairman Gilgoff explained that the format of the public hearings will include staff's presentation of the application, rebuttal from the applicant, public comment, and the Board's discussion.

- A. Discussion/possible action on an appeal filed by Mr. Philippe Buillet regarding an interpretation of the City of Sedona Land Development Code made by the Zoning Administrator (Director of Community Development) concerning the establishment of a contractors yard in the C-3 (Heavy Commercial/Light Manufacturing) zoning district. The contractors yard in question is owned by Mr. Steve Burnett Enterprises, Inc., an excavation contractor. Mr. Buillet is specifically appealing the Director's interpretation that an excavator's contractors yard also includes the screening and processing of materials (dirt, rock, etc.). The subject property is located at 2160 Shelby Drive, Sedona Arizona, and is also identified as Assessor's Parcel Number 408-28-266. A general description of the area affected includes but is not necessarily limited to the Triple A Industrial Park and Sunset Park. Appellant: Mr. Philippe Buillet, Case Number: AP2011-1**

John O'Brien explained that this is an appeal of his interpretation of the City's Land Development Code as the Zoning Administrator for the City of Sedona, and City Attorney Mike Goimarac will be making that presentation.

Mike Goimarac indicated that we are here to decide an interpretation of the Land Development Code and the fundamental issue before us is whether the activity of screening and processing material is an accessory activity of a contractors yard. The facts in this case are that on Shelby Drive there is an open area that is leased by Mr. Burnett and his company, a landscaping or contractor company, and on that area they routinely have dirt that they have removed from a site, and they want to screen the rocks out. This is a C-3 industrial zone and the appellant's property is surrounded by C-3 Industrial, even though he is operating a bed & breakfast. The appellant has challenged Mr. O'Brien's interpretation of the Land Development Code saying that this kind of activity of screening dirt is not an accessory activity to owning a contractors yard.

We can begin with understanding that this interpretation probably has implications beyond this case, because Sedona is an area that is rocky and hilly, and when you build, you have to move dirt and do something with that dirt in an economical fashion. If you decide that screening of

material is something you can't do even in a heavy industrial area, essentially you have zoned that activity out of the entire City limits, because you are essentially saying that you will take your dirt out of the City limits and screen it somewhere else, and that is the implication of that interpretation. Mike explained that Mr. O'Brien has concluded that is not the reasonable interpretation of the Land Development Code.

Mike indicated that he would begin with what is undisputed about what is in the Land Development Code. In the C-3 zone, he thinks all of the parties will agree that contractors yards are something that is specifically allowed, and it would also be undisputed that per the Land Development Code it allows, "Accessory uses and structures located on the same site as a permitted use". Once again, the question is if merely screening material, as part of your construction activity, an accessory use or not, and accessory use is defined in the Land Development Code as, "A use clearly incidental to and customarily found in connection with such a primary use". Taking that definition, there are a lot of examples of how this use has been customary; in fact, across the street is another contractor, Brewer Brothers, who has existed for 18 years in the City of Sedona, who is a major contractor in town, and in fact, the City employs that contractor as its primary contractor for street improvements, and who has been conducting screening and processing activity throughout that duration of time, so that is one example of this activity being customarily in the activity of construction and in a contractors yard.

Mike Goimarac indicated that the appellant is claiming that this isn't an accessory use; what we are really doing is mining and because the Land Development Code doesn't include mining, it is illegal, so that is something that is up to you for interpretation. He would merely submit the question of if we are having mining, what are we mining? Are we mining gold, silver? If we are having mining, where is the mine? When you think of the term "mining", you don't typically think of somebody taking a front-end loader and picking up dirt and putting it on a screen to separate rocks and other material from the finer material.

Mike indicated that he wanted to clarify that Mr. Burnett's business is as an excavator and as a septic system installer, so to install septic systems, he is going to be removing dirt and there are probably many other septic system installers in the City that might need to do the same kind of activity. Possibly the real problem is not that Mr. Burnett is engaging in an accessory activity to his contractors yard, but that we have a bed & breakfast that is surrounded on three sides by commercial activity, and is trying to conduct that activity and feels like it is being affected by the allowed uses in a commercial yard.

Mike wanted to also point out that as one of the conditions of this activity, in order to mitigate the impacts, the contractor is required to use water to mitigate dust and to ensure that mud, etc., doesn't go on the street, so efforts have been taken to mitigate this activity, but he doesn't believe that it was intended under the Land Development Code to say that this very routine activity for any contractors yard is simply not allowed in the Sedona City limits, and for those reasons, we would ask you to uphold the decision of the Director.

John O'Brien explained that there are other issues that the appellant has brought up that he called on page 3, "Non-interpretation related issues" and those really aren't the reason we are here today. The only reason the Board is here is to decide whether his interpretation of the Land Development Code, to allow screening and processing of material as an accessory use in the C-3 zone is permitted or not. It is not to talk about dust control, access, impacts on Forest Service trails or Sunset Park, etc. The issue that the Board is dealing with today is specifically that interpretation issue.

#### **Board Questions of Staff:**

Board Member Gordon stated that there are places where such activities are prohibited within an area outside. Those places have inside facilities to accomplish this, or do they just have to take it to a different county or something? John O'Brien explained that the C-3 Zoning District

is the only Zoning District in Sedona that permits contractors yards. Board Member Gordon clarified that outside of Sedona, there are places that would not allow this activity anywhere in any of their zoning categories. John O'Brien asked if he means in other communities and Board Member Gordon stated yes and asked if as far as John knows there is an alternative way to handle these materials without processing them outside. John O'Brien indicated not that he is aware of. This type of dirt processing really lends itself to the outside.

Chairman Gilgoff asked if there is a representative of Mr. Burnett who wants to speak and a lady in the audience indicated that she represents the property owner; Mr. Burnett is not the property owner of the subject property. Mr. Buillet is the property owner that filed the appeal and Ms. Tingle has been confused with Mr. Burnett; she is the property owner of the subject property, so she would like to speak on behalf of Ms. Tingle.

**Presentations:**

**Tosca Henry, Attorney representing Ms. Tingle, the Property Owner, Cottonwood, AZ:** Indicated that she wanted to clarify this affects Ms. Tingle's tenant, Mr. Burnett, and her other tenants on the property. She would ask the Board to deny this appeal and uphold the Director's interpretation of the C-3 Zoning that screening and processing of rock, sand and dirt is an accessory use to a contractors yard. She would also like to address some of the issues raised by the appeal, like Mr. O'Brien said, there are other issues in the appeal that she won't address, because they are not really in the scope of what should be looked at today. Those are safety issues, Forest Service issues, and the issues of the use of North Road versus Shelby, and she is not going to speak to those today, unless there are specific questions from the Board relating to the items in the packet. She would like to have the Board look at a map of the AAA Industrial Park, Tract A. Tract A is the property owner, Mr. Buillet, who is bringing this appeal against the use of the property. The subject property is #3 and the diagonal lines represent the area of the property that is being used for the processing of materials. This property has been owned by Ms. Tingle when recorded in 1984 and used continuously as a contractors yard, including use for excavating and processing of materials since 1985.

Ms. Henry referenced the City park across the North Road easement and indicated that in Exhibit B, the aerial map shows the same area, and looking at the entire bottom half of the map, it is all zoned C-3. Mr. Buillet brings up the point in his appeal that it is mostly a residential area, and as illustrated by the map that is simply not true. The closest residence is in the northwest corner and it has the buffer zone. It cannot see any of their operations from that residence; the buffer zone, park easement and the storm drainage area by the storage area buffers their operation from any of the residences.

Tosca Henry then indicated that Exhibit C is another map that takes it out even farther and shows the home and clearly the buffer of the storage shed, the park, the easement, drainage and any neighboring uses on this side of Shelby Road, which are all zoned C-3. Referencing the middle of the map, she pointed out that you can see the building and the excavating yard for Brewer Bros, which is doing a similar processing of dirt, rock, sand and materials on their property.

Tosca Henry indicated that she feels this appeal demonstrates the tension mostly between the tourism industry and the construction industry, and this operation has been operating since 1985. She believes the deed was recorded by Mr. Buillet in 2003 and she feels that he knew that he was trying to operate a bed & breakfast, which she is not sure is a real conforming use, but that is neither here nor there; he knew what he was getting into when he moved into the neighborhood. She doesn't have anything further, but she would respectfully ask the Board to deny this appeal and find in favor of upholding the Director's decision.

**Board Questions of Ms. Henry:**

Chairman Gilgoff asked how many different tenants there are on Ms. Tingle's property and Tosca Henry indicated that there are several; she just recently lost a tenant that was there for

over 25 years and she has a couple of other vacancies, but she would estimate about twenty. Ms. Henry then identified the area of the buildings on Exhibit A. The Chairman asked why Mr. Burnett's unit has to be in the corner closest to the B&B and if it would be possible to allow him to move to the other side. Tosca explained that the way the property is set-up, she has buildings that have been built and the ingress and egress for the larger trucks would be more difficult with the other tenants, in their course of business. There is also a tenant that has items stored toward the back of the property and to make that curve would be nearly impossible. She doesn't drive heavy equipment, but it is much simpler to access the property the way they have been, because of the use of the property by the other tenants. The Chairman asked how often the sifting is actually used and Tosca explained that it depends on the project. The demand may be heavier in some months and lighter in others. The Chairman asked if it is once a month or daily and Tosca repeated that it depends on the project. Currently, he is not using the property for the next two weeks or so, but he may have a busy period the two weeks after that. He tries to be conscientious and tries not to do it late in the evening or at the crack of dawn, and he keeps the area as dust free as possible and keeps it watered down. He is trying to be a good neighbor, but he wishes his neighbors would do the same.

Board Member Gillon asked if all of the parcels are owned by Ms. Tingle and Tosca indicated only the parcel identified as #3 with the asterisk is owned by her, but they are all C-3, except for Tract A which is RM-3.

Vice Chairman Rich asked if the processing of the material is merely using a Grizzly to separate the material into various sizes or if any other process is used. Tosca indicated that to the best of her knowledge, that was the separating, she can't speak to the Grizzly. The Vice Chairman indicated it is the sifter with the big bars on it that they drop the material through and Tosca indicated that is what he was doing and John O'Brien added that is also his recollection.

Councilor McIlroy asked if the issue, apart from what she has told us, i.e., dust, noise, hours; is there something that is driving this apart from the zoning interpretations? Tosca indicated that she believes there was a little bit of the above, but the real issue for the Board of Adjustment to decide is whether this use is an accessory use of a contractors yard.

Board Member Beddome indicated that he has visited the site three times in the last couple of weeks and he is in total sympathy with the property owner's position.

**William Ring, Attorney for Mr. Buillet, the Appellant, Flagstaff, AZ:** Indicated that he is here for the applicant, who is appealing the decision and determination that Mr. O'Brien came to, that mineral activity is an accessory use to a contractors yard. Mr. Ring expressed that he hoped Mr. Beddome's mind is open enough to hear from the applicant before coming to a decision about the case; you heard a discussion from staff and from the property owner regarding the question you are here to decide. He wanted to say that he has a professional relationship with John O'Brien; he is a very good planner and the Director who made the decision in this case, so if he makes comments that disagree with John's determination, it is not a personal issue and he and John understand that, but he wanted the Board to also understand that he and John both respect that relationship; likewise with Mr. Goimarc and the representative for the landowner.

Mr. Ring indicated that he agrees with John's characterization that they aren't here to seek a zoning enforcement action about uses or complaints that appeared in his client's application. They don't want you to take enforcement or consider whether the Conditions of Approval of the use about hours and dust control are the right conditions -- that is not the Board's role to decide. You are here to determine whether "contractors yard" is expansive enough to include mineral activity as an accessory use to a contractors yard, and you aren't assisted in any particular way, because the Ordinance doesn't define what a contractors yard is, and that is why to some degree the question is important for you to determine whether this is an accessory use or not.

Mr. Ring indicated that he would submit that if you go further to define what a contractors yard is and try to incorporate mineral activity within a contractors yard, that is really a legislative act which belongs to the City Council, not the Board of Adjustment, so you have to play it pretty tight and interpret the common sense language when you think of contractors yard.

Mr. Ring then indicated that he had some exhibits to distribute to the Board and staff. He submitted a photograph that was taken in June by Mr. Jean Buillet, who is here to testify, and he is the son of the owner of the property and they operate together "*A Sunset Chateau*". The picture is a characterization of what they are talking about. When you determine what a contractors yard allows, it is important for you to refer to the Ordinance, and frankly the creation of the Ordinance. The City Council is the author of the Ordinance and when you try to interpret what "contractors yard" means, one of the first things you need to do is take a look at the intents and purposes underlying zoning in Sedona, and they appear in Section 101, Purpose.

Mr. Ring then indicated that the history of Sedona is a short history in terms of its municipal background, because for the longest time it was an unincorporated area of two counties, so several land uses that were established in and about Sedona were established when the County was the zoning authority and jurisdiction to plan and zone these areas. In the mid-80s, there was a movement to incorporate and Sedona elected to do so, and they adopted Zoning Ordinances to govern the land uses in the jurisdiction, but they did so with particular guidance that is laid out inside the Zoning Ordinance itself in Section 1, Purpose, and it sets out the primary objective, and says, "The natural beauty and scenic vistas in Sedona are a unique asset that benefits both residents and visitors alike. Sedona's natural environment helps to define the quality of life for its citizens. Maintenance of the natural environment is critical to the continuing economic well-being of Sedona." And then it goes on to say, "The purpose of the Code is to establish standards and regulations for the use of land", and it provides for interpretations and goals to guide your interpretation of the Ordinance. In every one of these guidance elements in Section A.1 - 8, all talk about protecting the natural environment, encouraging the natural environment, and providing for open space and view sheds.

Mr. Ring indicated that you live in the community and often come across these kinds of questions, so when Sedona adopted zoning, the thing it didn't do was adopt an industrial zone. It decided that industrial activities are not the kinds of things that can be squared with the community, when the primary objectives are things like the natural environment and open space. The City elected not to zone for industrial uses. You might think that is unusual, but it is not that unusual for Arizona communities to do that; Paradise Valley has the views, open spaces and vistas in the midst of a metropolitan area and has no industrial zoning, and most of its commercial uses come by way of Conditional Use Permits, where the Planning & Zoning Commission approves the project subject to conditions. Sedona in like kind approached it the same way and said it didn't want those industrial uses, so you don't have an industrial zone and the City was intentional about that.

Mr. Ring indicated the other thing about the Ordinance is that the Zoning Map was adopted in 1995 that set out the C-3, C-2, C-1 and the RM, and uses like the adjacent mining operation, gravel operation and screening, that Mr. O'Brien referred to in the Staff Report, predates. . . , he said 18 years or 1993. It was probably established prior to the adoption of the Zoning Ordinance that wouldn't have industrial-like activities in Sedona, so it doesn't make for a good comparison in this case, and that was Brewer Bros.

Mr. Ring indicated that he thinks we all agree that the issue is with a term that has no definition. Is mineral operations incidental or accessory to a contractors yard? If you look at the exhibit, which is a picture of the subject property, they believe that based upon the evidence that what the tenant is doing is not a contractors yard, but importing materials from somewhere else, spoils and waste from a site elsewhere in Sedona or maybe outside of Sedona in the County. The materials are coming to the site and being imported to the site, the earth, spoils and waste, and those are processed through the Grizzly, so there is a separation of these mineral products

based upon their size. The bigger pieces are screened in one place and the smaller pieces are located in another, and all of it happens outdoors, not within a structure, and once the material is separated, it is stockpiled, and then exported for use somewhere else. The excavation of the product isn't happening onsite; it is happening offsite. The spoils and waste are being imported onsite to be processed, and then exported offsite for use somewhere else. Keep that in mind when you consider what activity is going on there; it is not inherent to the use of a contractors yard. You do not have to do this activity to have a contractors yard; the tenant is electing to do this activity along with a contractors yard.

Mr. Ring indicated that their main argument is that these are two uses, not one use. He believes it was Mr. Goimarac who asked where the mining is and that is a fairly good question. If you look in his handouts, there is something called the United States Department of Labor OSHA Standards for various classifications of use, and some Zoning Ordinances in Arizona refer to the SIC, Standard Industrial Classifications, to separate land uses into the types of places and locations, and where they belong and where they don't. If you look at how the Department of Labor defines mining, you will see the classifications on the exhibit, and Mining is Division B, and under Mining is Major Group 14, Mining and Quarrying of Nonmetallic Materials, and then if you look at the other page, there is a definition of what that means. Mining and Quarrying of Nonmetallic Materials, under definition 1442, Construction Sand and Gravel means, "Establishments primarily engaged in operating sand and gravel pits, dredges and in washing, screening and otherwise preparing sand and gravel for construction uses."

Mr. Ring indicated that he submits to you that the land user in this case is engaged in screening and otherwise preparing sand and gravel for construction uses; that is where the mining is on this site. He is not digging a hole and processing materials, he is bringing materials to the site, screening them and preparing them for construction uses elsewhere, so this is much more than a construction yard activity.

Chairman Gilgoff pointed out that it also says "primarily" and Mr. Ring agreed and indicated that if you are going to say this is accessory that is what they are appealing. They are not saying that this is accessory to a construction yard at all, because think about what construction yards are. They could be a plumbing construction yard, a roofer's construction yard; it is a place where you store the heavy equipment and the materials. If it is a lumber yard, you might store the lumber, but you don't take the tree down and mill the tree to create the boards and call yourself a contractors yard; you are engaged in a different kind of activity. It is the same thing here; you can call yourself a contractors yard, but as soon as you start processing and separating the material, and then exporting it for use or sale offsite, you are engaged in something else.

Chairman Gilgoff asked, if you are a lumberyard and you sorted the lumber on the property that was coming off of the trucks, would that be an accessory use of a lumberyard or would that be another use. Mr. Ring stated that the Ordinance addresses lumberyards and the Chairman explained that he is not talking about a lumberyard; he is talking about the analogy and repeated his question. Mr. Ring stated that if you are changing the nature of the product, and the Chairman asked if Mr. Burnett is changing the nature of the product. Mr. Ring stated yes he is, it goes from unsegregated spoils and waste, which could be disposed of in a landfill, and essentially recycling the spoils and waste into a product, in fact a couple of products -- the heavy stuff from the light stuff, and then exporting them offsite to another location for use elsewhere. This material isn't even for use onsite; it is not incidental to the contractors yard; it is probably incidental to a use that is happening somewhere else offsite, whether it is in the City or the County. He is not building something there with this material; the material doesn't originate onsite and it doesn't stay onsite. It is brought to the site in raw condition, processed and exported somewhere else, and that is not a contractors yard. A contractors yard is the place where you store the trucks and the heavy equipment for the next job.

Mr. Ring then indicated that there are two dangers. If you should consider that this kind of excavation activity is incidental to a contractors yard, then you are going to see it occur elsewhere in your community, without a Conditional Use Permit, anywhere a contractors yard is allowed. The P&Z Commission doesn't get to see it; the City Council doesn't get to see it and the staff will determine the Conditions of Approval. Citizens don't get to object until the use is established. If you are in a P&Z process where there is a conditional use, because you are concerned about dust, noise, disturbances to the neighborhood, hours of operation, days of the week, locations, screening, the types of things that a P&Z Commission would be concerned about, you don't get an opportunity. If you affirm staff's position, the community doesn't get an opportunity to comment on a use that looks like this in their neighborhood or an opportunity to set the conditions or give their input or speak to their Council or elected representatives. All of this will happen at the staff level and the community is disengaged from the process until it occurs and they see it, and that is a lot of gravity that goes along with the decision you have to make.

Mr. Ring indicated that the other thing about staff's decision is in the report, they seem to want to refer to an excavation contractors yard, as if an excavation contractors yard has certain uses allowed as accessory, and he supposes the plumbing contractors yard would have uses that are accessory, and likewise with roofing, maybe the tar pot is out there spinning tar for the roofer's contractors yard, but that is not your Ordinance. Your Ordinance says, "contractors yard"; it doesn't segregate it into different types of yards; it just calls it a contractors yard with no definition. With all due respect to staff, he thinks they expanded the intention of the Ordinance to an area where it wasn't intended to go, to start calling different kinds of contractors yards permitted uses, when all it has is one kind of animal -- a contractors yard.

Mr. Ring then stated that the third thing is if you support staff's determination in this case, you should be prepared for this kind of use to expand on the site. If for instance, the tenant were to lease more of the property or if a contractors yard were located anywhere else in the C-3 zone, and slowly but surely, the pile of raw materials will grow and grow accessory to a contractors yard. Those are the reasons why this is probably too broad an interpretation, because there are too many concerns that your community would have, and this ought to be a conditional use or disallowed altogether, but if you allow this use, you are preparing your community for something it didn't intend. If you take a look at the intentions of why you adopted the Zoning Ordinance in the first place, the purpose is to protect the natural environment and the scenic beauty of Sedona.

Mr. Ring indicated that the consequence is if you agree with them that the outdoor processing of mineral materials is not incidental to a contractors yard, then what is the remedy? The Ordinance can be amended to allow this as a conditional use. The Ordinance can be amended to allow a definition of "contractors yard", and that is something that happens legislatively in front of the City Council. One of the things that staff gave short attention to is how other communities define "contractors yard", but in those communities that have considered that question, one being Coconino County, and the reason Coconino County is important is because some of your DNA in your community comes from the decisions that Coconino County made prior to the incorporation of Sedona, and they have gone through the exercise of trying to determine what a contractors yard is from what it is not. In their case, a contractors yard, "Shall mean the use of any lot or parcel of land for commercial or non-commercial parking, storage, maintenance of commercial vehicles and/or more than one piece of commercial machinery and/or outdoor storage of building materials, aggregates, lumber, plumbing, vehicles parts, tires." None of that is processed and it is the processing that creates the dust and noise and the disturbance. The other part is when you look at C-3, in several of the instances where you have light manufacturing occurring onsite in C-3, oftentimes, that occurs inside a structure. We have given a couple of examples of where the Council has spoken about what is allowed in a contractors yard and the things that are accessory or incidental to it. It has named those types of things that belong inside structures, because the concern is if you don't contain it inside a structure, you get exactly what we have here -- disturbance, noise, dust and things that weren't

intended. He doesn't need to belabor the argument to say it is things like a lumber mill, but not the manufacturing of furniture out the door, and a couple of other uses in the C-3 zone where the Council has made a distinction between what happens outside and inside. If this type of use was contained within a structure, then fine; you could manage the nuisance, but because this use is indiscriminate outdoor, you don't have the opportunity to control the nuisance, except for conditions that staff imposes upon them, but one in which the community doesn't get a say.

Mr. Ring indicated that there are a couple of other people who would like to speak once you open it to public comment, and summarized that the decision you have is an interpretation of a term in the Ordinance that has no definition. Staff has taken the interpretation that accessory processing of minerals onsite is accessory to a contractors yard, and they are saying that interpretation is too expansive. It exceeds the intent of the Ordinance established by your Council and community to protect the natural qualities of Sedona. It violates the notion that an industrial use can go in a commercial zoning, when your community doesn't have industrial zoning. This is really a piece of land with two uses, not one use. The first use is contractors yard, which they have no objection to, and the second use is mineral processing of spoils and waste for import and export offsite -- that is a second use. This is not accessory to the first use; it is two uses. The second use, the mineral processing is not allowed in this zone -- it is just not there, and he thinks that is fairly self-evident if you look at the Ordinance and consider the arguments.

**Board Questions of Mr. Ring:**

Board Member Gordon asked if we had a pile in the parking lot and wanted to move it to this contractors yard, so we pulled up a dump truck and filled it with this stuff, do we have to do anything special before we take the dump truck to the contractors yard? John O'Brien explained that it would have to be covered.

Mr. Ring stated that raises an interesting point and this is where he disagrees with the City Attorney's characterization. You produce these spoils and waste, what are you supposed to do with it except process it, but what you forget is you could process it onsite. When ADOT was doing the project through Sedona and when you go past construction sites, you often see Grizzly's on the site processing the materials on the construction site. What is different is that the Grizzly isn't on the construction site; it is in the contractors yard, and the material is taken from the parking lot to the contractors yard, processed, and then exported for use somewhere else. These uses often happen onsite, not offsite. In this case, it is happening offsite, not onsite and that is the difference and makes it two uses.

Board Member Gillon indicated that the issue seems to be the screening and even going by the County's definition, the storage of aggregate is okay, so by your arguments, he would presume you would have no objection if a dump truck came in everyday or two and dumped a load of dirt in there, and then another dump truck came along and got the front-end loader and lifted it up and dumped in onto another truck -- the only thing you are really disturbed about is the screening. Mr. Ring indicated it is the screening and he can't answer that question for you, because it is really a community standard that Sedona has for itself. John O'Brien pointed out in the Staff Report that we don't want to look at other jurisdictions, because those definitions aren't important to us. You have to establish what your community standards are going to be for this kind of use. Coconino is just an example and he would suggest that you look at the intentions of the Ordinance and that you wouldn't want this kind of activity in the C-3 zone as an accessory use. You would want it either somewhere else or if you were going to have it, you would allow it by Conditional Use Permit where the community can participate in crafting the conditions. This is a community standard that you have to determine for yourselves.

Board Member Gillon stated that the whole argument about mining has to do with processing the dirt, not just the storage of the dirt and Mr. Ring agreed. Board Member Gillon then stated that really the objection from your standpoint is the processing, not the storage and Mr. Ring interrupted to say that it is the storage of the dirt if it is not generated onsite and if it is for export

offsite; that is his client's position. Coconino County is an example of a community that grappled with it and they set their own community standard for how to treat it. You have to set your own community standard based upon the guidance that you have in your Ordinance.

Chairman Gilgoff indicated it is interesting that you brought up Coconino County as an example that our DNA comes from, and they allow storage in their contractors yards. Mr. Ring noted that is true, but that is not his client's position that you should in your community, because your community has much stricter standards set for itself, when it evaluates these kinds of issues. The Chairman stated that you hear about the boilerplate statement that we're quality of life, but that doesn't change our zoning. Mr. Ring responded that you have to interpret; your role is to interpret, you are not legislating, you are interpreting and when you interpret, you ought to filter your decision through the eight points of standards and intent laid out in your Ordinance. He can read them if you want; the Chairman stated no thank you.

Vice Chairman Rich referenced Mr. Rings mention of onsite Grizzlies to separate the material, but when that is done, 99 times out of 100, that is because the material is reused onsite. If the material is not segregated and used on site, it is always exported, so if you are putting in a septic tank in somebody's backyard, you are obviously not going to reuse that material in a septic tank system, so you have to export it; the material has to go someplace. Mr. Ring indicated that in a contractors yard for an excavation company, you could store the Grizzly in the contractors yard; that is not the problem. It is using the Grizzly; that is where the contractor has options. When they dig a septic tank and they have to dispose of spoils and waste, there are alternatives other than the C-3 zone. You can take it to the landfill or to the National Forest in those places where the National Forest has allowed for the disposal of materials, and there are those types of locations. It doesn't have to go to the contractors yard. The Vice Chairman pointed out that it is 40 miles to the closest landfill from Sedona; however, Mr. Ring indicated that can be reflected in the haul cost for a yard of material; it goes into the contractor's bid.

**Rebuttal by Mike Goimarac, City Attorney:** If we look at the purposes behind the Land Development Code, one is to "facilitate the adequate provision of transportation, water, schools, parks and other public infrastructure requirements." In trying to fulfill that purpose, we have established industrial zones in the City of Sedona, because we see that having those zones and allowing certain industrial activity to take place in that zone is beneficial to the City as a whole, but rather than having it take place in residential areas or other areas, we have very limited industrial zones. John O'Brien clarified they are Heavy Commercial Zones and Mike Goimarac agreed they are Heavy Commercial Zones and asked how many C-3, Heavy Commercial Zones there are typically. John O'Brien indicated there is this one, AAA, and the Contractors Road - Yavapai Driven area are the C-3 zones. Mike pointed out that if you look at most of those, they are covered by buildings, so there isn't a major concern that we are going to have a rampant influx of contractors yards throughout the City.

Mike Goimarac indicated that he heard Mr. Ring say that rather than take this dirt and separate it in the yard they can do it onsite, so if you are building a house and have a lot of excavation, let's just do this "mining operation" in the residential area or if you have a place on 89A and need to move a lot of dirt, rather than move it to an industrial zone and separate it, let's just do it onsite. He would submit that has more potential impacts than allowing a very innocuous screening operation to take place in a C-3 zone and by having those zones and allowing such limited activities, we are fulfilling some of the purposes behind the Land Development Code.

Mike then indicated that throughout Mr. Ring's presentation, he used words like "mineral activity" "processing", "separation of mineral products", and he thinks Mr. Ring was attempting to make this look like a mining operation. If you were to ask Mr. Burnett what his mineral activity is, he would probably scratch his head and ask what you mean. He takes dirt to his site and runs it through the Grizzly to screen it. We even had references to the OSHA Manual, but he is not aware of any OSHA complaints about mining operations of sand and gravel, dredging operations in the City limits or any interpretation by OSHA that this is a mining operation.

Chairman Gilgoff interjected that Mr. Ring was just trying to identify in his case that since we don't have a definition of a contractors yard, he tried to define it as he saw it. It had nothing to do with OSHA. Mike Goimarac explained that his point is that you can't juxtapose OSHA's interpretations and definitions on the City of Sedona. We do have and he has been told that we have a definition of an accessory use, and this is undisputed, "A use clearly incidental to and customarily found in connection with the primary use", so the question you need to ask in making your decision is are these screening operations of taking dirt and running it through a Grizzly really a use that is customarily found in connection with the primary use of having a contractors yard. In his opening statement, he said you have a good example of that being a customary use in that Brewer Bros. has been doing this across the street for 18 years.

Chairman Gilgoff indicated that he understands; this is a rebuttal to something he said and you have already said that, so you really need to move on. Mike Goimarac explained that the point he is trying to make is that you are asked to interpret the Code and you need to determine whether this is customary or not and we have an example of that being a customary use.

Mike then indicated that essentially what we have here is Mr. Ring is attempting to interpret contractors yards out of existence in the City of Sedona, and it is customary for contractors yards to engage in minor screening of materials, so the question for the Board is whether or not that falls within the definition of an incidental use or not and he would submit to you that given the history, etc., it does.

**Board Questions of Mr. Goimarac:**

Board Member Gordon indicated that you have criticized the use of the Coconino County standards and the OSHA standards, and we have to make this interpretation, and one of the things you do in making an interpretation is look at an encyclopedia or dictionary to find out what something means, so what would you suggest we use as guidance for the Board's interpretation. Mike Goimarac explained that very thing that defines what an accessory use is; it is in the Land Development Code. Board Member Gordon stated that is pretty broad though and Mike asked if it is customarily found in connection with the primary use. Is the screening operation customarily found in connection with a landscaping or excavation company that is on a contractors yard.

Board Member Gordon then stated that demolitions exist with a contractors yard, so should they be allowed to blow-up dynamite on a contractors yard? Mike explained that is not customarily found in the contractors yard. Board Member Gordon explained that it is not inappropriate for the Board to look at these other sources for guidance, whether we choose to accept them or reject them is a different issue.

*Chairman Gilgoff opened the public comment period at this time.*

**Charles Cottle, Sedona, AZ:** Indicated that the first time he was here was in 2009 and he stayed at the B&B in question. It was the most beautiful view in the whole City, that hill right there, and it motivated him to want to move here. He returned a year later with his kids to confirm they wanted to move here too, and they did. They have been here just over a year. In his profession, he does seminars and he got the conference room at the B&B in question, and it was very disturbing to hear all of that noise, while he was having his conference. A lot of the people who came from all over the country commented as well, and when he asked the owner, he said it was because of the operation going on down the street and apologized profusely. When he looks at Sedona, it is like a National Park and you wouldn't see anything like this in a National Park, and in a parallel universe, this is a National Park.

**Jean Bullet, an owner of the Sunset Chateau, Sedona, AZ:** Indicated that he heard that the noise and dust really didn't affect the people surrounding that area, but he just went around with a petition last Friday to the three streets that are right across from the park and asked the people, and they are very angry and unhappy about the prospect of it and the noise and dust.

Just from a practical standpoint, he knows that it is not germane to what we are talking about, but as far as Mr. Burnett seeming to follow all of the rules all of the time, he is creating tons of dust and he is not watering down the dirt the majority of the time. He is parking his vehicles in the easement and even after a 90-day period to clear it out, he still hasn't cleared it out completely.

Chairman Gilgoff asked cleared what out and Mr. Buillet explained that he was using the easement to leave materials, park trucks and construction equipment. The Chairman asked if it is on North Road and Mr. Buillet indicated yes, the easement on North Road. The Chairman indicated that he was just there this morning and there was nothing parked there. He didn't see any debris, etc. Mr. Buillet indicated that the debris has been cleared out of the road, but they are still using it for vehicle and equipment storage and it is outside of the fence, and like engines breaking down in the street all the time, whenever they are coming in. It is true that sometimes it is very light, but other times it is constant.

Chairman Gilgoff asked how often it happens and Mr. Buillet indicated that it varies; it has been pretty quiet the past couple of months, but it could be 3 to 4 months at a time, when it is daily, and then there are times like now when there is a real lull. The Chairman pointed out that the City has a Noise Ordinance too and then asked John O'Brien if we can do anything to enforce the dust control and noise . . . , John O'Brien interjected that he was taking notes and we do have conditions on this permit, so staff will look at that and enforce those.

Chairman Gilgoff then stated that we are going to assure you that no matter how this goes that the City will take action and make sure they don't violate the conditions of use and that they don't violate the City's Ordinance. Mr. Buillet indicated that is tough enforcement honestly and Chairman Gilgoff asked why. Mr. Buillet explained that you would have to almost be there to catch them, they don't . . . Chairman Gilgoff interrupted to point out that Mr. Buillet has a telephone and he can call Community Development or John O'Brien's office and say they are violating the law and ask for someone to be sent over.

Mr. Buillet indicated that it is always him versus Mr. Burnett. If someone is using engine brakes down the street all the time . . . Chairman Gilgoff interjected that is different, but if somebody is working for three continuous days making a large amount of noise and a large amount of dust, that is something you can report and the City can stop them.

Mr. Buillet indicated that the people who live around there really do hear the noise; it travels, it is not an insignificant space. That park is kind of an open zone. Chairman Gilgoff asked if they signed a petition and Mr. Buillet indicated yes. It was just the people who were home last Friday.

Board Member Gillon referenced a specific residential area and asked if that was the one Mr. Buillet was talking about, and Mr. Buillet explained that there are three streets directly across the park -- Bonita, Camino Vista and Monte Vista. Chairman Gilgoff added that it is a manufactured home community; however, Mr. Buillet clarified it is not the manufactured home community, there are some manufactured homes and some permanent structures, but the people living on those streets certainly hear the noise, even from the recycling center, and they are really against the idea of having even more permitted there. One woman was so angry, she indicated if they allow the permit, she is moving, but people are really pretty angry about even the potential of giving a permit for that. Mr. Buillet then gave John O'Brien the petition for the record.

**Greta Jones, Sedona, AZ:** Indicated that she is one of the people who signed that petition and she lives on Camino Vista. Everything these gentlemen said, she couldn't say any better. The noise factor coming from this area is almost unbearable. They purchased the home a year ago and the seller neglected to disclose the fact that there is a Heavy Commercial Zone in her backyard, so what does she do? She is not happy there; at 4:00 a.m. every morning,

somebody is banging trash cans or slamming dump trucks, dogs are barking. You mentioned there is a Noise Ordinance; may she know what that is? Nick Gioello suggested talking with her later, since it is not part of the hearing, but the Noise Ordinance is kind of complex. Barking dogs have one standard; it can't be more than 15 continuous minutes. Construction materials exempt from the Noise Ordinance . . . Chairman Gilgoff interrupted to suggest that they meet after the hearing and John O'Brien indicated staff will get with her. Ms. Jones indicated if they do the rock-crushing thing or whatever, her home value will go down, because she would disclose it. Legally you have to, but who is going to buy that house when you tell them there will be rock sifting going on, in addition to the two dog areas. There is the Humane Society, the kennel, the Bark 'N Purr or something, and the multitude of noise sources is beyond anybody's comfort.

Chairman Gilgoff indicated that is the same issue as somebody moving next to an airport, and then wanting to close the airport. Ms. Jones indicated that you would usually notice that and disclose it. Chairman Gilgoff asked if she didn't drive around the neighborhood before buying her house and Ms. Jones indicated yes, but they didn't go up there. They thought there was a nice park there and they had a really good deal and thought they should grab it, so they might not have done their homework, but neither did the seller do what he was legally supposed to do. That is neither here nor there and she understands that, but Sedona should be friendlier to its citizens who pay the taxes here and listen to what they have to say and do something to at least lessen . . . Chairman Gilgoff stated that the City will try to work with her.

Ms. Jones indicated she has called the City on the Noise Ordinance and the dogs do bark 15 minutes and way beyond; this morning it was two hours. They started at 6:00 a.m. and went to 8:00 a.m. non-stop, but nobody did anything. John O'Brien indicated he will give her a call.

*Having no additional requests to speak, the Chairman closed the public comment period.*

#### **Summary Discussion:**

Board Member Gillon indicated that the question here is screening and he has some concerns with some of what was presented -- the definition of mining, for example, and the OSHA thing says, "Establishments primarily engaged in operating sand and gravel pits and dredges, and in washing, screening or otherwise preparing sand and gravel for construction use", and that "and" is very important. To be a mining operation, you have the excavation part, so he doesn't think this is a mining operation at all. It is unfortunate that we have residential next to C-3, but we have it, so we have to deal with that issue. If this contractor were a middle person who was accepting dirt from some person and processing it and selling it to someone else, that would be one thing, but it is not; this is a person who does that as part of his own business. He extracts it from the job he is on, brings it to his yard, and then processes it and takes it to another job he is on, so it is not like a middle-man operation. His primary operation is the landscaping stuff. Mike Goimarac replied to the concern of having these yards popping up all over the place; they can't, they can only pop-up in the C-3 zone and most of those are taken.

John O'Brien wanted to clarify that contractors yards are allowed in a C-2 zone with a Conditional Use Permit; he misspoke earlier. It would go through the Planning & Zoning Commission for a Conditional Use Permit. Board Member Gillon concluded by saying that the whole notion of taking dirt from a job and to a landfill or the forest, and then having to dig out new dirt for the next job strikes him as wrong in an area where we are trying to keep things local and to conserve, etc.

Vice Chairman Rich indicated that his father had quarries all of his life and he grew up in a sand and gravel quarry, and he is very familiar with the definition of mining sand and gravel and digging it out of the ground and processing, etc., and there is no way this can be construed as a mining operation. What he finds interesting is the reference to Coconino County and being able to store aggregate. There is as much or more dust generated by storing, unloading and loading; there is no difference in that activity than putting it through a Grizzly. The amount of

material processed by this organization is small. It is easily the same as storing aggregate on a property, so under that definition, Coconino County would even allow this. This is definitely an accessory activity; it is all part of the same business. He has an excavation business; he needs to process that, so he can dispose of it or use it wherever, and the way he looks at it, it fits the definition of an accessory use.

Board Member Beddome indicated that he concurred and he has built several houses in this town and knows what you have to go through, when you are building, storing and working, and whether you bring in the guy down the street or not. You have roofers up there with stinky stuff once in a while, and it is just part of what a guy has to do to stay in business, and these are the kind of guys that pay the bills. He was born and raised not far from here and he is going on 84-years-old, so he has seen this town when there wasn't anything here and he watched it grow, and he knows we have to have operations like we have on top of that hill. We can't have them any other place, we're committed to what we have and we need to protect what is left up there, and the guys have to build and construct and sort and work with their materials -- he is in total agreement with the decision of John O'Brien. He is in sympathy with the guy that bought a piece of property and wishes he hadn't; he has remorse, because he and Chairman Gilgoff used to live up on that hill. Board Member Beddome indicated that he didn't move because of the airplanes; he knew there was airplane traffic there, so it is an unfortunate thing that like in a marriage, you have to have an argument once in awhile, and it is too bad the way it works out sometimes. When we are ready he will be one of the motion makers to go along with this thing.

Board Member Gordon indicated he didn't think that it was any secret while this was going on that he had a lot of sympathy for the appellant and he is not as knowledgeable as some of his fellow Board Members about what constitutes contracting and excavation activities, but he has been fairly well persuaded by his fellow Board Members that this would be an acceptable accessory use. Personally, he would rather see something like this require a Conditional Use Permit, but that is more of a legislative issue than an issue for the Board.

***MOTION: Board Member Beddome moved to deny the appeal of the Director's interpretation related to Case Number AP2011-1; hereby allow the screening and processing of materials (dirt, rock, etc.) associated with an excavation contractors yard. Board Member Gillon seconded the motion. VOTE: Motion carried five (5) for and zero (0) opposed.***

Chairman Gilgoff stated that the Director's decision has been upheld.

- B. Discussion/possible action regarding a request for a variance to exceed the exterior side yard wall height of three feet in the RS-70 (Single-family) zoning district by an additional two feet, six inches. The applicant is requesting the additional height to provide security, privacy and a noise barrier from the vehicular traffic on Dry Creek Road. The subject property is located at 25 Garnet Hill Drive and is adjacent to Dry Creek Road. The property is further identified as Assessor's Parcel Number 408-43-036. A general description of the area affected includes but is not limited to the area north of the intersection of Dry Creek Road and Garnet Hill Drive. Applicant: William Lacy, Case Number: V2011-1**

Nick Gioello explained that this is a request by the applicant, William Lacy, for a variance from the Land Development Code to exceed the exterior side yard south wall height, which is a limit of 3 ft. in the RS-70 single-family zoning district, and they want to exceed that height by an additional 2 ft. 6 in. Nick explained that the limitation is placed on the exterior side yard in six of thirteen single-family zoning districts, which is when you have a property that has frontage on two streets. One street is the front yard and the other is considered an exterior side yard. There are generally differences in the Code regarding exterior side yards in terms of setbacks and fence heights. In this RS-70, the limitation is 3 ft. solid, and the applicant is requesting a variance from that height for several reasons -- security, privacy, visual relief and as a noise barrier.

Nick explained that according to the applicant, there is a wide area adjacent to the property off of Dry Creek Road that is part of the City's right-of-way. It is relatively flat, gravel and free of any obstructions, so it creates a point that is a natural turnout for anyone that wants to stop, take a picture, take a call or park and go into the forest, which is only about 450 ft. away. The applicant has attested that the turnout is used by jeep tours, horse trailers, hot air balloon trailers and various other vehicles that use the area continually.

Nick indicated that the background is that staff issued a Building Permit for the wall at 6 ft. and that was done in error on his part. A citizen asked a question about that fence being that high, and when he looked at it and realized that he had issued it in error, he asked the applicant's contractor to stop construction, and that is why the fence is in its current state of being partially built up to that height, but not in its finished condition. They graciously stopped construction and he met with the applicant, William Lacy, and his partner, Linda Goldenstein, as well as the contractor and discussed the issues, so they agreed to go for the variance, since the only way we could grant the additional height is through this variance process.

Nick pointed out that there is a difference in the zoning districts, and about eight or nine years ago, because prior to that no single-family residence could have anything but a 3 ft. solid fence on the exterior side yard or in the front yard, but a number of issues developed with people who complained about not getting enough privacy and people driving up and down, etc., so the intent was to allow additional height in those zoning districts that are smaller, to provide for security, noise barriers, screening, etc. In the larger zoning districts, it was felt it wasn't necessary, because the lots are much larger and the homes are much farther away and they are in areas where there isn't a lot of traffic.

Nick explained that this particular property is on Dry Creek Road, which has seen increased amounts of vehicle traffic over the years due to development outside of the City in Seven Canyons and people going to Enchantment and the Forest Service in that area. His main point is that this property is in a unique situation that is not typical for an RS-70 Zoning District, and that is why he provided the analysis on how staff doesn't consider it a special circumstance and they don't feel that it is granting a special privilege and that this condition of wanting security for this area and visual relief from this area is not being created by the applicant, and those are the three important things that have to be considered.

Nick added that he has been to the site a couple of times, including with a previous owner to discuss the same issue years ago, and he recalls seeing dirty diapers and a fair amount of trash that was being unloaded by people who parked there, and being out there recently and watching cars stop there as we were discussing the fence height, he thinks everything the applicant has said is true.

#### **Board Questions of Staff:**

Board Member Beddome asked if initially the permit was going to allow a 6 ft. fence, and now you are recommending 5 ft. 6 in. Chairman Gilgoff indicated that Nick said the original Code said 3 ft. and Board Member Beddome repeated his question. Nick explained that when the applicant came in for the original permit, the ground was going to vary, so it was going to be between 4 ft. and 6 ft. We have figured out since then that they can cut off some of the top and it doesn't need to be more than 5 ft. 6 in., so that is why we are proposing that height limit.

Board Member Gillon referenced the drawing included in the packet and indicated that the road appears to be 2 ft. or 2½ ft. higher than the property, so a 3 ft. fence would be like having no fence at all. Nick indicated that it is a little higher than that from the house, because when you park there . . . Chairman Gilgoff interjected that the house is probably about 8 ft. below. Board Member Gillon explained that his point is that for people driving along, visually they zoom right over and almost see the bottom of the house. There is no screening at all visually or otherwise.

Vice Chairman Rich indicated that he sees from the letter that the HOA has concurred with this, and Nick indicated yes. They provided a letter from the HOA and they are in full support of this. Board Member Gillon asked if there had been any objection to it and Nick indicated no.

Chairman Gilgoff indicated that the wall is a pretty attractively articulated wall, so is the City okay with it as far as the City is concerned, if they just completed what is there? Nick indicated that the wall is now at the height that has been planned, and some dirt will be moved back up against the wall, and then it will be stuccoed and finished with vegetation planted in front of it. The visual wall you are seeing now will be even less when all the landscaping goes back in.

*Chairman Gilgoff then opened the public comment period.*

**Maureen Koza, President of the Estates at North Slopes Homeowners' Association, Sedona, AZ:** Indicated that the homeowners' association is very much in favor of this and the Design Review Committee has reviewed the wall several times and they are in favor of this addition to this home. As a resident of North Slopes, the traffic and level of noise from the roadway has grown over the years, and she lives within the subdivision, so she can only imagine what the road volume is at that corner lot. They are very much in support of this feature.

Chairman Gilgoff stated that it sounds like the wall will act as a noise barrier to the whole subdivision; the most northern piece of the subdivision is pretty long. Ms. Koza agreed and added that she was very impressed that the views are maintained. You can drive along Dry Creek Road at that area and still maintain the views.

*Having no other requests to speak, the Chairman closed the public comment period.*

**Summary Discussion:**

Vice Chairman Rich indicated that one of the things the Board of Adjustment needs to do is consider the three criteria in the Staff Report and that is very well done and demonstrates that it does meet the criteria for the variance.

Board Member Beddome indicated it is another one of those times where common sense is okay if it overrides the Ordinance or the rule.

***MOTION: Board Member Gordon moved for approval of Case Number V2011-01 based on compliance with required ordinance findings as set forth in this Staff Report. Board Member Gillon seconded the motion. VOTE: Motion carried five (5) for and zero (0) opposed.***

**2. Approval of minutes for the following meetings: October 18, 2010**

Nick Gioello indicated that he pulled an incorrect date for the agenda, but the City Attorney thinks it is okay for us to correct that date and approve the minutes you have for November 10th. Chairman Gilgoff then indicated that we need a motion to approve the minutes as corrected to November 10th.

***MOTION: Board Member Gordon so moved. Board Member Beddome seconded the motion. VOTE: Motion carried five (5) for and zero (0) opposed.***

Chairman Gilgoff commented that it looks like exterior side yard walls in RS-70 probably should be allowed to be 6 ft., because it is an exterior side yard wall, rather than an interior side yard wall. He then asked if a note of that could be made for the next time you do the Land Development Code and John O'Brien indicated yes, we would have to do an amendment to the Code. Board Member Gillon noted that it may be one of those informational things that Planning & Zoning may want to pick up; it is an easy fix. Nick added that it should probably apply to all zoning districts and John O'Brien indicated that staff will talk to the Chairman about that for a discussion item.

**4. Adjournment.**

Chairman Gilgoff called for adjournment at 3:35 p.m., without objection.

I certify that the above is a true and correct summary of the meeting of the Board of Adjustment held on September 21, 2011.

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Donna A. S. Puckett, *Recording Secretary*

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Date